EDITOR'S NOTE

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No. 99-6615
99A307

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,

Respondent

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit and on Application
for Stay of Execution

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

The Warden, by counsel, supplements his previously filed brief in opposition as follows:

I. THIS COURT'S PENDING DECISION IN PORTUONDO v. AGARD IS NO BASIS FOR EITHER STAYING PETITIONER'S EXECUTION OR REVIEWING HIS CASE.

In his reply to the Warden's brief in opposition, Williams offers several reasons why this Court should either grant a stay or grant certiorari in his case on the basis of his so-called "Agard" claim. None has any merit:

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Not The Same Issue

Williams admits that the claim under review in Agard involves a prosecutor's allegedly improper jury argument, while Williams' claim objects to the prosecutor's cross-examination.[1] But, according to Williams, "[t]his is a distinction without a difference." (Reply 2).

The Second Circuit, however, expressly recognized the difference and concluded that the difference mattered: "We...express no opinion as to the...constitutionality of similar remarks made during cross-examination***summation remarks raise constitutional issues which either are not present or are of less concern when made upon cross-examination." Agard v. Portuondo, 117 F.3d 696, 708 (2d Cir. 1997). It is quite obvious, then, that this Court's ultimate decision in Agard will not impact a claim, like Williams', which is based upon cross-examination rather than jury argument.

Barred by "New Rule" Doctrine

Petitioner expressly admits that the "new rule" doctrine is not at issue in Agard. (Reply 3). Nor does he dispute that the Fourth Circuit ruled in his case that his claim is barred by the "new rule" doctrine. These admissions, by themselves, are ample grounds for denying his certiorari petition.

Williams nonetheless argues that, even though the Fourth Circuit's "new rule" rejection of his claim will not be impacted by this Court's decision in Agard, the Court should grant certiorari in his case to decide the merits of the Fourth Circuit's "new rule" decision. In other words, even though this Court has granted ***the State's*** certiorari petition in Agard to decide whether the Second Circuit's ruling in a prisoner's favor is constitutionally valid, the Court simultaneously should grant certiorari in Williams' case ***just in case*** the Court decides in Agard

[1] Williams tacitly admits that he has preserved no claim with respect to the prosecutor's jury argument.

to rule in the prisoner's favor. Merely to state such a "cart before the horse" proposition is to recognize its absurdity.

Harmless Error

Finally, petitioner acknowledges that the Fourth Circuit also expressly found that his claim, at most, would constitute harmless error under Brecht v. Abrahamson, 507 U.S. 619 (1993), but argues that the Fourth Circuit erred by emphasizing his inculpatory testimony. (Reply 4). According to petitioner, absent the prosecutor's cross-examination of him about having heard all the other witnesses testify, he likely would not have been convicted of capital murder.

This Court, however, should not grant certiorari or a stay merely to review the Fourth Circuit's fact-specific application of the correctly-stated and clearly-established Brecht standard. Moreover, both the district court (Ptn. App. 18) and the Fourth Circuit (Ptn. App. 5, 7) – both of whom are intimately familiar with the requirements of Virginia law regarding proof of capital murder – recognized that, in light of Williams' highly inculpatory testimony (which obviously preceded the prosecutor's cross-examination), there was no reasonable likelihood that he would have been convicted of anything less than the capital murder of Mr. Keller. Indeed, by Williams' own admission, it was his idea to commit the armed robbery, his idea to burn down the Kellers' home and, most importantly, he admitted that he fired the first shot into Mr. Keller's head after Mrs. Keller had been raped and after the two victims had been marched into the woods behind their home to be executed. See Williams v. Commonwealth, 450 S.E.2d 365, 370 (Va. 1994). And, as the Fourth Circuit expressly found, despite Williams' speculation that the bullet he admits he fired into Mr. Keller's head may not have been "lethal" (Reply 4 n.1), the testimony of the medical examiner was that "each gunshot wound suffered by Mr. Keller contributed to his

death." (Ptn. App. 5). The Fourth Circuit correctly concluded that nothing more is required under Virginia law to sustain a conviction for capital murder.[2] (Ptn. App. 5).

II. THE FOURTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 2254(e)(2) IS A MOOT POINT BECAUSE, AS PETITIONER CONCEDES, THE COURT OF APPEALS REJECTED HIS CLAIMS UNDER PRE-AEDPA LAW.

Williams admits that, even though the Fourth Circuit interpreted 28 U.S.C. § 2254(e)(2) in his case, it also rejected his claims that he was entitled to an evidentiary hearing under pre-AEDPA law. He nevertheless insists that this Court should grant certiorari because the Fourth Circuit's interpretation of the statute "conflicts" with the decision of other circuits. Conspicuously absent from Williams' reply, however, is any answer to the Warden's reliance upon this Court's decision in Breard v. Greene, 118 S.Ct. 1352 (1998) or to the Warden's demonstration that all of the other decisions upon which Williams relies – unlike the situation in both Breard and Williams' case – involved claims that had been raised in state court and preserved for federal review. (See Br. Op. 11 n.8).

Moreover, as petitioner has acknowledged, the Fourth Circuit's decision in Cardwell v. Greene, 152 F.3d 331 (4th Cir. 1998), is perfectly consistent with the cases from other circuits upon which he relies. Thus, petitioner has demonstrated, not a "conflict" between circuits but, at best, merely an intra-circuit conflict which clearly does not warrant certiorari review. See generally Wisniewski v. United States,353 U.S. 901, 902 (1957). In reality, moreover, the Fourth Circuit's decision in Williams' case is perfectly consistent with Cardwell; petitioner

[2] Obviously, the alleged error could have had absolutely no effect on Williams' death sentence; ***he murdered six people during a short period of time while on parole***. Williams does not even suggest otherwise.

merely disagrees with the Court of Appeals' fact-specific determination that he failed to develop his claims (indeed, he failed to even ***raise*** his claims) in state court.

As for Williams' argument that this Court should grant certiorari merely to review the Fourth Circuit's fact-specific application of the pre-AEDPA "cause and prejudice" standard to his claims, the Warden generally will rely upon his previously-filed brief in opposition and offers only the following specific rebuttal:

Juror Stinnett

With respect to Juror Stinnett, Williams' speculation about the "relationship" between the juror and her ex-husband of 15 years (Reply 7 n.3) is just that; it is not evidence. The only evidence is that they had very infrequent contact since their divorce. (JA 1425a at ¶ 2).

With respect to Virginia law regarding valid jury challenges for "cause," Williams simply is wrong. Disclosure of the fact that Stinnett was Meinhard's ex-wife or that the prosecutor once had represented Meinhard would ***not*** have been the basis for a valid challenge for cause. See Lilly v. Commonwealth, 499 S.E.2d 522, 531 (Va. 1998) (mere fact that juror related to officer/witness does not require exclusion for cause). Indeed, even if the prosecutor once had represented Stinnett rather than Meinhard, the juror would not have been excludable for cause on that basis alone. See Roach v. Commonwealth, 468 S.E.2d 98, 109 (Va.), cert. denied, 519 U.S. 951 (1996).

The Psychological Report

With respect to petitioner's claim regarding the alleged withholding of Jeffrey Cruse's psychological report, Williams has attempted to mislead the Court in several ways:

First, Williams asserts that he raised the claim in federal court because he was afforded "resources denied in state court." (Reply 5). This assertion, however, was flatly contradicted by the district court which expressly held that Williams had discovered and raised the claim in federal

court ***with precisely the same "resource" he had been afforded in state court, namely, a court-appointed lawyer.*** (Ptn. App. 55).

Second, Williams asserts that he "filed an extensive Brady request" during the state habeas proceedings, implying that he filed such a request with the Virginia Supreme Court and it was denied. (Reply 9). What he refers to, however, is merely ***a letter*** his state habeas attorney sent to opposing counsel asking the Commonwealth in a collateral case to comb its files for any possible exculpatory evidence. (JA 376-380). The Commonwealth's reply advised Williams that any such discovery request should be filed with the state habeas court and the Commonwealth made no representation to Williams as to whether any such exculpatory evidence existed. (JA 381-382). The only discovery request that Williams ever filed with the state habeas court, however, was a request to force the Commonwealth to reveal Cruse's place of incarceration. (JA 398-399).

Finally, Williams asserts that, if he had been provided with the psychological report, his testimony "would have been unnecessary" and he would not have testified in such a highly inculpatory manner. (Reply 11). This assertion, however, is flatly contradicted by the sworn affidavit of his two trial attorneys which demonstrates Williams' "insistence throughout [the attorneys'] preparation for the case that he wanted to tell the jury what had occurred." (JA 1161).

III. THE OVERWHELMING AND UNREFUTED EVIDENCE IS THAT CRUSE TESTIFIED TRUTHFULLY AT TRIAL THAT HE HAD NO AGREEMENT WITH THE PROSECUTION.

Cruse testified at trial under oath that he had no agreement with the Commonwealth. (JA 170). During the state habeas proceedings, the Commonwealth's Attorney of Cumberland County and Cruse's trial attorney both submitted affidavits affirming the accuracy of Cruse's testimony. (Resp. Supp. App. 1-4; JA 1398-1401). During the federal habeas proceeding, Cruse's trial attorney submitted another affidavit, not only making unequivocally clear that

Cruse had no agreement or understanding, formal or informal, with the Commonwealth, ***but also swearing under oath that Williams' federal habeas attorney had attempted to get him to sign a false affidavit.*** (Resp. Supp. App. 5-8; JA 1402-1405).

Despite the overwhelming and unrefuted evidence, Williams asserts without any support in the record, that Cruse's attorney admitted to Williams' federal habeas counsel that there was an understanding between Cruse and the Commonwealth.[3] (Reply 13 n.10). This outrageous falsehood is typical of William's tactics throughout these proceedings and should not be tolerated.

Williams' reliance upon the prosecutor's jury argument regarding Cruse's credibility – "his back is against the wall; if he lies he dies" (Reply 12) – is misplaced. First, it is elementary that a Brady claim, as a matter of law, cannot be premised upon a matter that has been spread upon the record since the time of trial. Moreover, the prosecutor's argument meant nothing more than that if Cruse had ***any*** hope of avoiding a death sentence the last thing he could afford to do would be to be caught in a lie.[4] In view of Cruse's sworn trial testimony and the unrefuted affidavits of both the Commonwealth's Attorney and Cruse's trial attorney, the prosecutor's jury argument is a manifestly insufficient and speculative basis for granting federal collateral relief.

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[3] The only alleged "support" for Williams' outrageous assertion is the false affidavit which Cruse's trial attorney refused to sign. (JA 1405 ¶ 5). This Court must dispose of Williams' petition without regard to habeas counsel's unsupported, hearsay assertion.

[4] At other times, Williams has relied upon Cruse's acknowledgement at trial that "the judge" was going to decide whether he "lived or died." (JA 178). Like the prosecutor's jury argument, however, this is a matter that has been spread upon the record since the time of trial. In any event, Cruse's testimony represented nothing more than the indisputable fact that, under Virginia law, it ultimately is up to the trial judge to decide whether a death sentence actually should be imposed. See Va. Code § 19.2-264.5.

CONCLUSION

The petition for a writ of certiorari and the application for a stay of execution should be denied.

Respectfully submitted,

JOHN B. TAYLOR, WARDEN

By: _____
Counsel

Donald R. Curry
Senior Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4856

CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on October 26, 1998, I faxed a copy of the Respondent's Supplemental Brief in Opposition to the Clerk of this Court and faxed and mailed a copy to the office of Barbara Hartung, Esquire, 1001 East Main Street, Suite 504, Richmond, Virginia 23219, counsel of record for the petitioner.

_____
Donald R. Curry
Senior Assistant Attorney General

RESPONDENT'S SUPPLEMENTAL APPENDIX

AFFIDAVIT

1. I am Robert G. Woodson, Jr. I was the Commonwealth's Attorney for Cumberland County from 1989 to 1995. I prosecuted both Michael Williams and Jeffrey Cruse for capital murder in 1994. I presently am a General District Court judge in the 10th Judicial Circuit.

2. During the investigation of the capital crimes for which I prosecuted Williams and Cruse, I initially entered into a written plea agreement with Cruse and his attorney whereby Cruse would have been spared a death sentence. One of the conditions of the agreement, however, was that Cruse tell the complete truth and, when it subsequently was learned that he had breached this condition with respect to the rape of Mrs. Keller, I revoked the plea agreement.

3. At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty.

4. I do not recall specifically whether Williams' trial counsel were provided with an actual copy of Cruse's initial plea agreement, but I am confident that they were. A copy of this prior agreement was introduced at trial, however, and I know that Williams' attorneys were aware prior to trial of the substance of the prior agreement, as well as the fact that it had been revoked because Cruse had not been entirely truthful.

5. One of the other conditions of Cruse's initial plea agreement was that he take a polygraph test. Before such a test was administered, however, I learned that Cruse had not been truthful about the rape of Mrs. Keller and I revoked the plea agreement. Cruse later admitted that both he and Williams had raped Mrs. Keller. Because the plea agreement was revoked and

because Cruse admitted his involvement in the rape, a polygraph examination of Cruse was not conducted.

Robert G Woodson Jr
Robert G. Woodson Jr

Subscribed and sworn to before me by Robert G. Woodson, Jr. this 14th day of February, 1996.

Carolyn Z. Helgeson
Notary Public

My commission expires: 8/30/99

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Prior to being represented by Mr. Harrison and me, Cruse had been represented by James Baber. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had entered into a written plea agreement with the Cumberland Commonwealth's Attorney, whereby Cruse would have been spared a death sentence. This written plea agreement, however, was revoked by the Commonwealth's Attorney because Cruse had breached the agreement by not telling the complete truth about the offenses.

3. I was present in Cumberland Circuit Court when Cruse testified for the Commonwealth at the capital murder trial of Michael Williams. At the time of Williams' trial, Cruse had no plea agreement with the Commonwealth. Cruse testified truthfully at that trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence.

4. I do not have a specific recollection of whether Williams' trial attorneys asked our permission to interview Cruse prior to Williams' trial. I can state with certainty, however, that if such a request had been made, we would not have permitted Williams' attorneys to interview Cruse.

Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 7th day of February, 1996.

Notary Public

My commission expires: October 31, 1998.

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Jeffrey Cruse's co-defendant was Michael Wayne Williams. During Williams' state habeas corpus proceedings, I submitted an affidavit in which I stated: "At the time of Williams' trial, Cruse had no plea agreement with the Commonwealth. Cruse testified truthfully at [Williams'] trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence." This statement was true then, and it is true now.

3. On March 5, 1997, I was contacted by Williams' federal habeas counsel, Mr. James Moore. Mr. Moore later faxed to me a draft of an affidavit for my consideration. A copy of the draft is attached. Upon reading the draft, I telephoned Mr. Moore and informed him unequivocally that paragraph 5 of the draft affidavit was not true and that, during my earlier conversation with Mr. Moore, I never had told him that Cruse had "an understanding with the Commonwealth." I refused to sign the draft affidavit because the assertion made in paragraph 5 of the draft affidavit is not true.

4. I have been informed that on March 10, 1997, Williams' filed a document in federal district court which on page 32 states, "But in discussions by current counsel for Williams with Cruse's counsel about additional affidavits, Cruse's counsel has not completely refuted the possibility that some inducement from the Commonwealth existed." If this statement

is intended to be a reference to the contact between myself and Mr. James Moore described above, the statement is untrue.

5. At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth. At no time have I ever said or implied to Williams' habeas counsel, or to anyone else, that there was an informal agreement or understanding between Cruse and the Commonwealth.

Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 11th day of March, 1997.

Notary Public

My commission expires: October 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

AFFIDAVIT OF
DONALD C. BLESSING

Donald C. Blessing, having been first sworn upon oath, states as follows:

1. I am a lawyer licensed to practice in the Commonwealth of Virginia. My law office is located in Farmville, Virginia.

2. I was appointed to represent Jeffrey Cruse on his capital murder and other related felony charges in Cumberland County arising from the February 27, 1993 murders of Morris C. Keller, Jr. and Mary Elizabeth Keller. Lee R. Harrison, Esquire, of Camersville, Virginia, had already been appointed to represent Cruse when I was appointed. Mr. Harrison and I were co-counsel for Jeffrey Cruse. Prior to being represented by Mr. Harrison and me, Cruse was represented by James C. Baber.

3. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had reached a written plea agreement with the Commonwealth's Attorney, whereby Cruse would have avoided a death sentence. This written plea agreement was revoked

by the Commonwealth because Cruse breached the agreement by not telling the complete truth about the offenses.

4. As I have stated in a prior Affidavit dated February 7, 1996, at the time Cruse testified at the January 1994 capital murder trial of Michael Wayne Williams in Cumberland County, Cruse had no formal plea agreement with the Commonwealth.

5. At the time Cruse testified at Williams' trial, Cruse did have an understanding with the Commonwealth that if he cooperated with the Commonwealth in preparation for Williams' trial and testified against Williams, his cooperation and testimony might help him with the capital murder charges and other felony charges he was facing in Cumberland County.

_____
Donald C. Blessing

COMMONWEALTH OF VIRGINIA,

CITY/COUNTY OF _____, to-wit:

Subscribed and sworn to before me this ____ day of March 1997.

My Commission expires: _____

_____
Notary Public

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